

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GENERAL TEAMSTERS LOCAL)	
NO. 174, on behalf of certain of the)	No. 63006-7-I
employees it represents, and CARL)	
GASCA, DANE RADKE, and JAMES)	DIVISION ONE
HOLCOLMB, individually and on behalf)	
of others similarly situated,)	
)	
Appellants,)	
)	
v.)	UNPUBLISHED OPINION
)	
SAFEWAY, INC.,)	FILED: May 17, 2010
)	
Respondent.)	
)	

BECKER, J. — An exception to the overtime requirement in our state minimum wage act permits employers to use an alternative compensation system if it provides the “reasonable equivalent” of statutory overtime. This case involves an alternative system negotiated between Safeway and Teamsters Local 174, whereby the union drivers are paid for completing certain activities rather than by the hour. After the activity-based system had been in effect for several years, Local 174 filed suit claiming that its members had been denied proper compensation for overtime. We affirm the order of the trial court granting summary judgment to Safeway.

We review summary judgment orders de novo. Bostain v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846, cert. denied, 552 U.S. 1040 (2007).

We will affirm a summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Bostain, 159 Wn.2d at 708. “Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party.” Bostain, 159 Wn.2d at 708. To survive summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. CR 56(e); Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). “Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented.” Bostain, 159 Wn.2d at 708.

The law

Subject to certain exceptions, Washington’s Minimum Wage Act, chapter 49.46 RCW, bars an employer from employing anyone for a work week longer than forty hours unless the employee receives compensation for the employment in excess of forty hours “at a rate not less than one and one-half times the regular rate” for that employee. RCW 49.46.130(1). The exception litigated in this case excludes drivers who are covered by the Federal Motor Carrier Act.

The overtime requirement in RCW 49.46.130(1) does not apply to:

An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

RCW 49.46.130(2)(f).

Employer exemptions from remedial legislation such as the Minimum

Wage Act are “narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.’

An employer bears the burden of establishing its exempt status.” Stahl v. Delicor of Puget Sound, Inc., 148 Wn.2d 876, 881, 64 P.3d 10 (2003), quoting Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 301, 996 P.2d 582 (2000). The rights provided by the Minimum Wage Act may not be waived by a collective bargaining agreement. Schneider v. Snyder’s Foods, Inc. (Schneider I), 95 Wn. App. 399, 402, 976 P.2d 134, review denied, 139 Wn.2d 1003 (1999), cert. denied, 529 U.S. 1062 (2000).

The alternative system

Teamsters Local No. 174 is a union representing drivers at Safeway’s Auburn distribution facility. In 2003, Safeway and the union negotiated a collective bargaining agreement, effective from 2003 to 2005, that set forth a method for compensating drivers based on mileage and activity rates. In 2005, Safeway and the union negotiated another collective bargaining agreement, effective from July 2005 to July 2011, that retained the activity-based compensation system, also referred to as the “ABC System.” The compensation system assigns time values to delivery routes and activities. Those time values are referred to as “Standard Time.” As an example, a driver will earn 25 “minutes” of Standard Time for completing pretrip and departure duties regardless of how much time the driver actually spends completing those duties. For deliveries, the compensation system allocates Standard Time according to

miles per hour charts that vary by geographic area and time of day, factoring in traffic and congestion. When drivers are delayed by breakdowns, congestion, or inspections while completing a task, they may be paid for that extra time in addition to the Standard Time assigned to that task. Such extra time is referred to in the agreement as “Delay Time.”

The ABC system pays drivers based on total Standard Time added to any Delay Time or other non-driver hourly time. Wages are calculated using the hourly rate specified in the collective bargaining agreement. This rate is also known as the “base rate.” Depending on the driver, Contract Overtime is paid after 8 or 10 hours of Standard Time in a day, after 40 hours of Standard Time in a workweek, and for work on a sixth or seventh day. Contract Overtime is typically paid at a rate of one and one-half times the base hourly rate; sometimes, double time is paid.

Safeway keeps track of the total time that drivers are dispatched during the day. The time between a shift’s beginning and end is referred to as “Actual Time.” Because Safeway does not attempt to track personal activities, meal periods, or other uncompensated breaks, Actual Time does not necessarily reflect total hours worked. Safeway runs weekly comparisons of Standard Time to Actual Time for each driver and for the drivers as a group to determine driver efficiency. These efficiency calculations do not include Delay Time or other non-driving hourly work.

Safeway and Local 174 negotiated the time values and mileage charts

used to calculate Standard Time. Under the collective bargaining agreement, they are subject to review and arbitration to the extent the union questions their reasonableness.

The lawsuit

In 2007, Local 174 sued Safeway, alleging that its members had been denied proper overtime compensation under Washington's Minimum Wage Act. The union filed an amended complaint in June 2008, adding Carl Gasca, Dane Radke, and James Holcomb as putative class representatives and asserting a class claim on behalf of the union's members at Safeway.

In October 2008, the parties agreed to litigate whether the compensation system fell within the RCW 49.46.130(2)(f) exemption to the Washington's Minimum Wage Act's regular overtime requirement before addressing other issues. The parties also agreed to produce stipulated facts and cross-move for summary judgment, which they did on November 14, 2008.

The "Statement of Stipulated Facts" describes the ABC system in detail. And it identifies the limited issue before the court: "In this lawsuit, Plaintiffs are not questioning or challenging the reasonableness of the time values and mileage charts used in the ABC System. Instead, they are claiming that the structure of the ABC System violates state law."

The trial court granted Safeway's motion for summary judgment. Local 174 appeals.

FEDERAL MOTOR CARRIER ACT COVERAGE

The exception from the Minimum Wage Act applies to drivers only if they are "subject to the provisions of the Federal Motor Carrier Act." As part of the statement of stipulated facts, the union agreed that all three named plaintiffs

were, as drivers, subject to the federal act. Nevertheless, in responding to Safeway's motion for summary judgment, the union argued that Safeway's drivers were not subject to the Federal Motor Carrier Act because they never drove out of state. The union submitted affidavits to prove the drivers never drove out of state.

On appeal, the union has altered its position. The union now concedes that drivers can still be subject to the federal statute even if they never drive out of state. The union cites authorities indicating that drivers will be subject to the Federal Motor Carrier Act even if their deliveries are wholly intrastate, if the delivery represents a "practical continuity of movement" from manufacturers outside the state. See Walling v. Jacksonville Paper Co., 317 U.S. 564, 569, 63 S. Ct. 332, 87 L. Ed. 460 (1943). The union now argues that deliveries made by the Safeway drivers are not part of a practical continuity of movement of goods from outside the state, and the drivers for that reason are not subject to the Federal Motor Carrier Act.

To Safeway's argument that the union should be bound by its stipulation, the union replies that an erroneous stipulation of law is not binding. See In re Interest of J.F., 109 Wn. App. 718, 732, 37 P.3d 1227 (2001). This is true, but a factual determination is necessary before it would be possible to say that the stipulation here is erroneous. Whether the drivers are subject to the Federal Motor Carrier Act depends, the parties now agree, on whether there is a practical continuity of movement of the goods from out of state. The union did

not introduce evidence on this issue and therefore did not raise an issue of material fact sufficient to overcome the stipulation. “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. See also Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (refusing to consider argument for liability based on contractual obligations or the rescue doctrine when the party argued for premises liability before the trial court), review denied, 165 Wn.2d 1017 (2009). Accordingly, we do not consider this argument.

DEPARTMENT OF LABOR AND INDUSTRIES PRE-APPROVAL

Local 174 argues that Safeway does not qualify for exemption under RCW 46.46.130(2)(f) because it failed to get approval from the Department of Labor and Industries for the negotiated compensation scheme. The trial court properly rejected this argument. Nothing in the text of the statute requires employers to have their compensation systems approved by the Department of Labor and Industries. The regulation relied on by the union, WAC 296-128-012(1), likewise contains no requirement for approval. What it requires is reasonable notice to employees. Under this regulation, the Department may require an employer to “substantiate” its deviation from payment on an hourly basis, and may evaluate alternative rates of pay and formulas used by employers in order to determine compliance with RCW 49.46.130(2)(f). Thus, the Department is permitted to investigate an alternative compensation system

but is not required to do so. The fact that the Department has not evaluated and approved the Safeway ABC system does not render Safeway ineligible for the exemption.

REASONABLE EQUIVALENCE

Finally, Local 174 contends that Safeway's compensation system does not include "reasonably equivalent" overtime pay. Initially, the union argues that the activity-based compensation system does not actually pay overtime.

Employers subject to the standard overtime provisions must pay overtime at a rate of one and one-half times the regular rate of pay. RCW 49.46.130(1). Employees can be paid at a piece rate instead of on an hourly basis. In that case, the regular rate of pay for overtime purposes "may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week." WAC 296-128-550. The union characterizes Safeway's activity-based compensation system as a piece system subject to this rule. The union therefore contends that a driver's base rate for overtime purposes must include all of the compensation the driver receives in a week—including any amount earned as contract overtime. Brief of Appellant at 35 ("their regular rate of pay must include the premium pay"). This methodology would result in the driver getting paid twice for overtime, a result that makes no sense and that is not compelled by the statute or the regulations. Even under standard overtime provisions for piecework systems for employees who are not "specifically exempt," overtime may be paid at one and one-half times the piecework rate. WAC 296-128-550. And in any event, the regulations are different under the exemption for drivers subject to the Federal Motor Carrier Act. For those drivers, overtime pay must be at least one and one-half times the

“base rate of pay,” as opposed to one and one-half times the “regular rate” referred to in RCW 49.46.130(1). And the “base rate of pay” is the amount of compensation paid per hour or unit of work in a workweek of forty hours or less. WAC 296.128.011(1). The negotiated ABC system complies with WAC 296.128.011(1) by providing a base rate of pay per unit of work and setting overtime pay at one and one-half times that rate. Thus, we conclude Safeway’s system does actually pay overtime.

Alternatively, the union contends calculating overtime in this way means that a driver who takes longer than an hour to complete an “hour” of Standard Time will get shorted in overtime, and consequently the system cannot be said to provide overtime pay that is reasonably equivalent to standard overtime. Adopting the position taken by the union would mean that an alternative compensation system that sometimes pays a driver more overtime than a standard system is acceptable, but only so long as it never pays less in any given week. The exemption would be pointless if this were so. If the legislature wanted to provide a floor, it could have done so. Instead, it provided the standard of “reasonably equivalent.”

To be acceptable, the compensation system must include “overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.” RCW 49.46.130(2)(f). In the evaluation of an alternative system, it is appropriate to collect data, as Safeway did here, comparing the weekly pay an individual driver receives to what that driver would

have made under a regular overtime system. If the data shows—as it does here— that some individual drivers in some individual weeks are paid less for hours worked over forty than they would have been under an hourly rate system, that is not necessarily a basis for declaring the system invalid.

Safeway's motion for summary judgment asserted that the drivers as a group always had more Standard Time hours than Actual Time. Safeway supported its position with weekly efficiency reports from August 2004 to March 2008 comparing individual drivers' Actual Time to Standard Time. The efficiency reports showed that two of the three putative class representatives were paid for more hours under the alternative compensation system than if they were paid based on Actual Time. The third driver fell short by 2 percent but Safeway showed that his Delay Time, which was not included in the efficiency calculation, was greater than the shortfall between Standard Time and Actual Time. Safeway also offered an exhibit comparing the actual compensation earned by individual drivers over a 26 week period in 2005 with the amount the drivers would have earned under an hourly system with regular overtime. This exhibit was prepared in accordance with an administrative policy protocol issued by the Department of Labor and Industries for reviewing reasonably equivalent overtime compensation plans for truck and bus drivers. During each week in the comparison period, the ABC system paid more to the drivers as a group than would have been paid otherwise.

In response, the union argued that the system must assure that each

driver receives overtime that is reasonably equivalent, not just the group as a whole. The union pointed out that Safeway's figures showed that up to 20 percent of the drivers in any given week had fewer standard hours than actual hours. Safeway's reply did not dispute this contention, but asserted that "many of those drivers did not earn substantially less in the particular week and, over a longer period, they generally earned more under the ABC system." The union did not attempt to rebut this assertion.

In an unsuccessful motion for reconsideration, the union re-assessed Safeway's data and offered an analysis purporting to show that 18 drivers were collectively underpaid by \$37,468.52 over the same 26 week period in 2005, for an average loss of \$2,081.56 apiece. The union failed to identify a reason why this interpretation of the data could not have been presented earlier. That alone justified the trial court's denial of the motion. CR 59; Richter v. Trimberger, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988).

On this record, we conclude Safeway met the burden of showing that the ABC system complies with the statute. The collective bargaining agreement and efficiency data show that the system is structured to, and does, pay any given driver one and one-half times their base rate of pay when that driver exceeds 40 Standard Time hours in a week. While it is true that the Standard Time hours worked do not directly correlate with the hours of Actual Time it took to complete the task unit, no direct correlation is required for alternative compensation schemes. For example, this court has upheld an alternative compensation

system under RCW 49.46.130(2)(f) where the trial court found that there was “no direct correlation” between hours worked over 40 per week and the overtime pay component of the driver’s commission. Schneider v. Snyder’s Foods, Inc., 116 Wn. App. 706, 715, 66 P.3d 640, review denied, 150 Wn.2d 1012 (2003) (Schneider 2).

The union has put forth no facts concerning the three putative class representatives that would justify going to trial. The union has not shown that the compensation system is structurally flawed. The collective bargaining agreement provides a method for challenging the time values and mileage charts if in practice they turn out to be unrealistic, unfair or unsafe.

In summary, Safeway met its burden of coming forward with evidence that the ABC system complies with state law. Local 174 did not counter that showing. Summary judgment was properly granted.

Affirmed.

Becker, J.

WE CONCUR:

Jan, J.

Grosse, J.

